NO. 94559-4

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Petitioner,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Respondent.

AMICUS CURIAE BRIEF OF THE WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Among the issues in this case is the interpretation of RCW 51.24.100, which is crucial to the ability of the Department of Labor and Industries to recover adequate damages from a third party who negligently injures a Washington State worker. RCW 51.24.100 unambiguously states that evidence of industrial insurance compensation "shall not be pleaded or admissible in evidence in any third party action," and case law from third-party cases confirms that the court strictly excludes this evidence, without exception. This Court should hold RCW 51.24.100 prohibits evidence about industrial insurance compensation in a third-party case for any purpose, and a plaintiff in a third-party case therefore cannot open the door to such evidence. Alternatively, this Court should hold that when a plaintiff in a third-party case seeks general damages only, as in this case, then RCW 51.24.100 does not apply because there can be no possible recovery under the third-party statute. The plaintiff may therefore open the door to evidence of industrial insurance compensation, as in other civil cases.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Department has a vital interest in the administration of the statutory scheme known as the third-party statute, RCW 51.24, within the Industrial Insurance Act. The third-party statute authorizes either an

injured worker or the Department to bring a cause of action against a negligent third party who injures a worker in the course of employment, and the Department is entitled to a statutory lien against any recovery for benefits paid to the injured worker. RCW 51.24.030, .050, .060. This statutory scheme serves important public policies for the State—in third-party cases, "[t]he State benefits from reimbursing the [medical aid fund], enforcing workplace safety laws, and deterring future negligence." *Carrera v. Olmstead*, 189 Wn.2d 297, 311, 401 P.3d 304 (2017). RCW 51.24.100 prohibits evidence of industrial insurance compensation in a third-party case and it is crucial to the Department's ability to recover adequate damages from the negligent third party. The Department appears as amicus to address the interpretation of RCW 51.24.100 and whether the statute allows evidence of industrial insurance compensation in a third-party case for any purpose.

III. STATEMENT OF THE CASE

Michael Gilmore suffered an injury in the course of employment when a bus rear-ended his employer-owned van. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, No. 48018-2, slip op. at 1 (Wash. Apr. 25, 2017). Because of the injury, the Department paid Gilmore compensation for his lost wages and a lump sum permanent partial disability award. *Id*.

The Department was entitled to a lien for those benefits under RCW 51.24.060(2).

Gilmore sued Jefferson County Public Transportation Benefit Area (Jefferson Transit), seeking general damages only. *Gilmore*, slip op. at 2. Gilmore's witnesses testified in part about the financial stress that resulted from the injury. *Id*. at 5-6. Jefferson Transit argued that Gilmore "opened the door" and sought to have evidence admitted about the industrial insurance compensation received from the Department. *Id*. at 6. The trial court denied the request. *Id*. But the Court of Appeals reversed and held that the testimony about financial stress opened the door to the industrial insurance evidence, relying on a non-third-party case. *Id*. at 10-11 (citing *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998).

IV. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

RCW 51.24.100 prohibits any evidence of industrial insurance compensation in a third-party case. Notwithstanding this statutory prohibition, can the plaintiff in a third-party case open the door to evidence of industrial insurance compensation through testimony about financial stress?

V. ARGUMENT

A. The Plain Language of RCW 51.24.100 Prohibits Evidence About Industrial Insurance Compensation in a Third-Party Case for Any Purpose

Any evidence of industrial insurance compensation is inadmissible under RCW 51.24.100. That statute prohibits the admission of industrial insurance compensation in any third-party case, without exception:

> The fact that the injured worker or beneficiary is entitled to compensation under this title *shall not be pleaded or admissible in evidence* in any third party action under this chapter. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law.

RCW 51.24.100 (emphasis added).

This statutory prohibition was established under the third-party statute, RCW 51.24, within the Industrial Insurance Act. The third-party statute allows injured workers or the Department to pursue civil actions against third-party tortfeasors who cause a workplace injury. RCW 51.24.030(1), .050.[1] The Department continues to pay full compensation and benefits to the worker regardless of the worker's election to pursue recovery against the third party, and regardless of any eventual recovery. RCW 51.24.040. But any recovery is subject to a lien by the Department

[1] If the worker chooses to not pursue a civil cause of action, then the action may be assigned to the Department to prosecute or compromise the action in its discretion. RCW 51.24.050(1).

for such benefits. RCW 51.24.050, .060. The Department then divides and distributes the recovery between the attorney, the plaintiff, and the Department, as specified in mandatory statutory formulas. RCW 51.24.050(4), .060(1). For the formulas, the Industrial Insurance Act defines the term recovery to include all damages awarded except for loss of consortium. RCW 51.24.030(5). By case law, the Department excludes pain and suffering damages from the recovery for cases under RCW 51.24.060. *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 406-07, 239 P.3d 544 (2010). The Department, therefore, applies the distribution formula only to special damages under RCW 51.24.060(1).

1. The Legislature Intended RCW 51.24.100 to Strictly Exclude Evidence of Industrial Insurance Compensation in Third-Party Cases

The plain language of RCW 51.24.100 expresses the Legislature's intent in this third-party case. The fundamental purpose in interpreting a statute is to give effect to the Legislature's intent. *In re Estate of Haviland*, 177 Wn.2d 68, 75-76, 301 P.3d 31 (2013). If the statute's meaning is plain on its face, as here, then the court gives effect to that plain meaning. *Id*. at 76.

This Court has already stated that RCW 51.24.100 is unambiguous, *Entila v. Cook*, 187 Wn.2d 480, 489, 386 P.3d 1099 (2017), and under the plain meaning of the statute, any evidence of industrial insurance

compensation is inadmissible in a third-party case. The statute codifies strict exclusion of such evidence without allowance for any exception. RCW 51.24.100. The Legislature did not qualify this exclusion by specifying any circumstances where the court could admit evidence of industrial insurance compensation if a plaintiff somehow "opened the door." To the contrary, the Legislature used definitive language indicating its intent that such evidence "shall not" be admissible within the specific context of a third-party case. *See Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (courts recognize that "shall" imposes a mandatory requirement unless a contrary legislative intent is apparent). There is no contrary legislative intent apparent. Evidence of industrial insurance compensation in a third-party case should never be admissible.

This follows the statutory scheme and its underlying policies. The third-party statute "evidences the vital interest of the Department in a recovery from a responsible third party." *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 547, 789 P.2d 75 (1990). Both the Legislature and this Court have adopted a "strong policy favoring third party actions," recognizing that "third party actions are preferred in order for the Department . . . to recoup benefits paid to the worker." *Entila*, 187 Wn.2d at 488. This is a fundamental purpose of the third-party statute—to shift

the cost of the industrial insurance benefits paid under the claim from the industrial insurance funds onto the liable tortfeasors. *Maxey*, 114 Wn.2d at 549. Thus, workers and employers who pay into the medical aid fund are relieved from the responsibility of underwriting the damages caused by the third party tortfeasor who, by definition, never purchased industrial insurance coverage for the worker the tortfeasor injured.

A rule of strict exclusion in third-party cases is fundamental to this scheme. It empowers injured workers to recover from third parties the damages that are essential to reimburse the Department under RCW 51.24.060. In contrast, allowing evidence of industrial insurance benefits in a third-party case would undermine the means to accomplish this purpose and render the statute ineffectual. If the court admitted such evidence, then the jury could reduce damages by the amount of the industrial insurance benefits. This would improperly result in a windfall for the third party, who never paid those benefits. Even worse, the third party would escape those damages while the injured worker would still be required to reimburse the Department from whatever recovery, if any, remained. So the third party receives a windfall at the expense of the injured worker, and the industrial insurance fund is never fully reimbursed. The potential danger for this unfair outcome has previously "buttressed" this Court's exclusion of industrial insurance benefits in a

third-party case. *Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265 (2000).

Any corresponding concern about double recovery for the injured worker in this context is eliminated by the statutory distribution formula. RCW 51.24.060(1). That formula *requires* the worker to reimburse the Department for benefits paid. RCW 51.24.060(1)(c). A double recovery of industrial insurance benefits is therefore impossible.[2] And the damage award must account for the full measure of a worker's loss, without regard to benefits received, in order to result in a fair distribution. *See* 10 Arthur Larson, *Workers' Compensation Law* § 116.02 (2017) (it is important that third-party statutes "contain not merely an opportunity but an incentive to sue the third party, and particularly to strive for the fullest possible damage recovery."). Introducing evidence of industrial insurance benefits in this context would only diminish the recovery for no relevant purpose and unfairly prejudice the injured worker. *See Cox*, 141 Wn.2d at 441.

The Legislature understood the stakes for injured workers and the Department in these unique third-party cases, and RCW 51.24.100 explicitly and appropriately prohibits any evidence of industrial insurance

[2] Even if a double recovery was possible, it is better that the injured worker receive the windfall than the liable third party. 16 David K. Dewolf & Keller W. Allen, *Wash. Prac., Tort Law and Practice* § 6:35 (4th ed. 2017) ("Where a windfall by one party is unavoidable, it is preferable that the injured party receive the fortuitous benefit.") (citing *Cox*, 141 Wn.2d at 441).

compensation. Without strict exclusion, the worker and the Department cannot be adequately reimbursed from the liable third party.

2. Third-Party Case Law Confirms That Evidence of Industrial Insurance Compensation Is Not Admissible for Any Purpose

This Court previously analyzed RCW 51.24.100 in a third-party case and held unequivocally that "an employees' receipt of benefits is inadmissible in a third party action." *Entila*, 187 Wn.2d at 489. The Court applied the statute to bar the trial court from considering industrial insurance compensation to determine whether the defendant could have Title 51 immunity as a co-employee of the plaintiff. *Id*. at 489-90. Even though the defendant in that case argued that evidence of the industrial insurance compensation was relevant to the issue of immunity, the Court nevertheless upheld the plain language of the statute and held the evidence inadmissible. *Id*. at 489. The *Entila* decision confirms that RCW 51.24.100 uniquely shields third-party cases from any evidence of industrial insurance compensation.

Entila tracks with the holding from a Court of Appeals third-party case that explicitly adopted "a rule of strict exclusion" prohibiting evidence of industrial insurance compensation. *Boeke v. Int'l Paint Co. (California)*, 27 Wn. App. 611, 617-18, 613, 620 P.2d 103 (1980). The defendants in *Boeke* argued that such evidence was admissible to show a

"lack of motivation to return to work." *Boeke*, 27 Wn. App. at 617. The legal question was substantively similar to the question in this case: whether evidence of industrial insurance compensation is admissible for any purpose in a third-party case. The Court of Appeals answered definitively, no. *Id*. at 618. The court adopted this rule of strict exclusion after it carefully considered two alternative approaches: a rule of general admissibility and a rule granting the trial court discretion to admit in limited situations. *Id*. at 617. The court said a rule of strict exclusion, instead, "represents the better view." *Id*. at 18. So, in the context of a third-party case, the court in *Boeke* explicitly considered whether to allow exceptions to the general bar against evidence of industrial insurance benefits and choose instead to enforce a rule of strict exclusion, with no discretion for the trial court.

This Court likewise followed the general policy of strict exclusion in another third-party case. *Cox*, 141 Wn.2d at 441. The defendant in *Cox* argued that industrial insurance benefits were admissible to show malingering, to impeach witnesses, or to attribute injuries to a separate incident. *Id*. at 440. This Court responded that, even if such evidence had "marginal relevance," it would be unfairly prejudicial to admit for those purposes. *Id*. at 441. There was no indication that the plaintiff could open the door to this evidence for any purpose. *Id*. That is what the rule of strict

exclusion means, by definition—industrial insurance benefits are not admissible for any reason in a third-party case. *See* 2 Jacob A. Stein, *Stein on Personal Injury Damages Treatise* § 13:14 (3rd ed. 2017) ("The strict rule precludes the admission of evidence of collateral source payments for any purpose."); 22 Am. Jur. 2d *Damages* § 780 (2d ed. 2017) (the strict exclusionary rule makes evidence of collateral source benefits inadmissible even when offered for other limited purposes, like to show malingering).

Similarly, this Court should apply the plain language of RCW 51.24.100 here to exclude evidence of industrial insurance compensation, even if the evidence was arguably relevant. Such evidence would have been marginal at best and substantially outweighed by prejudice against the worker and the Department. Industrial insurance benefits like time loss compensation do not fully replace the worker's lost wages—a temporarily totally disabled worker receives only a portion of their previous wages, between sixty to seventy five percent depending on family status, with a cap of 120 percent of the average monthly wage in the state. RCW 51.32.090(1), (9)(a); RCW 51.32.060. So evidence of those benefits does not directly contradict an injured worker's testimony about financial stress. And, in light of the mandatory third-party distribution formula, such evidence serves only as a threat to unfairly reduce the recovery.

Admitting industrial insurance evidence would also result in protracted and complex inquiries into an accounting of those benefits and how they related to the worker's prior financial status. It would open up a rabbit hole of distracting, unhelpful, and prejudicial questions. A rule of strict exclusion for third-party cases avoids this prejudice without sacrificing relevant evidence.

Entila, *Boeke*, and *Cox* each applied a rule of strict exclusion in the face of arguments similar to those made here. There were no exceptions allowed. Nor was there any implication that a plaintiff could somehow open the door to invite such evidence. This confirms the plain language of RCW 51.24.100 and supports the underlying policies of the third-party statute. Following these decisions, the Legislature has not amended RCW 51.24.100 to permit any exception to admit industrial insurance evidence. It has therefore acquiesced to the courts' interpretation requiring strict exclusion. *See Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (Legislature's failure to amend a statute in the 17 years since the court's decision interpreting that statute implied that the Legislature concurred in that interpretation).

3. Common Law Exceptions to the Collateral Source Rule Should Not Apply in Third-Party Cases

The Court of Appeals in this case relied on *Johnson* to conclude that industrial insurance evidence could be admitted, but *Johnson* was not a third-party case and it analyzed only the common law version of the collateral source rule. 134 Wn.2d at 804. RCW 51.24.100 was not before the Court in *Johnson*. 134 Wn.2d at 804. This Court should distinguish the language and context of RCW 51.24.100 from the common law application of the collateral source rule in non-third-party cases.

"The *common law* collateral source rule allows an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of the tortfeasor." *Johnson*, 134 Wn.2d at 798 (emphasis added); *see also* 16 David K. Dewolf & Keller W. Allen, *Wash. Prac., Tort Law And Practice* § 6:35 (4th ed. 2017) ("The collateral source rule is an evidentiary principle, not a cause of action."). The collateral source rule is closely related to Evidence Rule 411, which makes liability insurance inadmissible on the issue of fault but admissible for other purposes. In contrast to RCW 51.24.100, the evidence rule explicitly states that such evidence may be admissible for other purposes and provides specific examples. ER 411 ("This rule does not require the exclusion of evidence

of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."). The common law collateral source rule similarly allows limited exceptions. 16 Dewolf & Allen, *Wash. Prac., Tort Law And Practice* § 6:35.

In *Johnson*, a non-third-party case, this Court noted that an injured party may "waive the protections of the collateral source rule by opening the door to evidence of collateral benefits." 134 Wn.2d at 804. The issue was whether the collateral source rule applied to workers' compensation proceedings at the Board of Industrial Insurance Appeals. *Id*. This Court held that it applied but noted it was possible for the claimant to open the door on remand, as in "typical civil cases." *Id*. This rationale makes sense since workers' compensation proceedings share the same basic evidentiary considerations as other civil cases. RCW 51.52.140.

But the analysis from *Johnson* does not apply here, in a third-party case. A third-party case is not a workers' compensation proceeding. It is a cause of action brought under unique statutory authority. RCW 51.24.030. The rules and procedures for workers' compensation proceedings do not contain anything similar to the third-party statute's unqualified bar against evidence of industrial insurance compensation under RCW 51.24.100. A third-party case is not a typical civil case either. A third-party case is part

of a detailed statutory recovery scheme that implicates unique concerns. The Legislature designed the statute to allow the worker to recover damages from a liable third party *even though* the worker already received benefits from the Department. RCW 51.24.040. The liable third party is supposed to pay damages for those benefits anyway, and then the Department in turn recovers those benefits from the worker. RCW 51.24.060. Allowing evidence of such benefits for any purpose would defeat the fundamental purpose of the third-party statute. This Court should not rely on *Johnson* to hold that a plaintiff can open the door to industrial insurance compensation in a third-party case. *See Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 445-46, 378 P.2d 684 (1963) ("general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.").

B. Alternatively, This Court Should Narrowly Hold That RCW 51.24.100 Does Not Apply When the Plaintiff in a Third-Party Case Seeks General Damages Only

If this Court accepts that an injured worker can open the door in a third-party case by testifying about financial stress, then the holding should be limited to cases where the plaintiff seeks general damages only, as in this case. Here, Gilmore did not claim any special damages, like lost earnings or medical expenses—the type of industrial insurance benefits

covered by the Department and recoverable under RCW 51.24.060. This Court may hold then that RCW 51.24.100 does not apply to these facts.

RCW 51.24.100 is the mechanism that facilitates an adequate recovery for the worker and the Department under the third-party statute. But general damages are not considered part of the "recovery" that is subject to the distribution formula in RCW 51.24.060. *Tobin*, 169 Wn.2d at 406-07. By claiming general damages only, Gilmore effectively removed this case from the considerations of RCW 51.24.100 and the third-party statute in general. The essential function of the third-party statute is to recover from the third party the same type of damages that the worker received from the Department. That is impossible when the worker chooses not to pursue special damages. In that scenario, the third-party case becomes indistinguishable from a typical civil case and, consistent with *Johnson*, the plaintiff may open the door to evidence of industrial insurance compensation. *See Johnson*, 134 Wn.2d at 804.

However, when the worker claims *both* special and general damages in a third-party case, the potential for unfair prejudice remains unavoidable and RCW 51.24.100 should apply as an unequivocal protection against that prejudice.

VI. CONCLUSION

The plain language of RCW 51.24.100 resolves this issue. This Court should hold RCW 51.24.100 prohibits evidence about industrial insurance compensation in a third-party case for any purpose, and a plaintiff in a third-party case cannot open the door to such evidence. Alternatively, this Court should hold that RCW 51.24.100 does not apply when a plaintiff in a third-party case seeks general damages only.

RESPECTFULLY SUBMITTED this 27th day of November 2017.

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DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served Amicus Curiae Brief of the Washington State Department of Labor and Industries and this Certificate of Service in the below described manner.

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